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No. 83-1383

In the Supreme Court of the United States

OCTOBER TERM, 1983

MARK K. KRIEG,

Petitioner,

vs.

THE PAUL REVERE LIFE INSURANCE COMPANY,

Respondent.

BRIEF FOR RESPONDENT THE PAUL REVERE LIFE INSURANCE COMPANY IN OPPOSITION

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QUESTION PRESENTED

Did the Eleventh Circuit's review of the entire evidentiary record on review of the judgment n.o.v. reflect a serious, material conflict between the circuits, especially relevant to ADEA cases, warranting the exercise of this Court's supervisory powers?

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Text

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OPINIONS BELOW

Respondent accepts the petitioner's statement of the opinions below but adds that the opinion of the Court of Appeals has been reported at 718 F.2d 998.

JURISDICTION

Respondent accepts the petitioner's statement of jurisdiction.

STATUTORY PROVISIONS AND RULES INVOLVED

Respondent accepts petitioner's statement of the statutory provisions and rules involved.

STATEMENT OF THE CASE

Respondent adopts the statement of the case set forth by the Court of Appeals below at 718 F.2d 998, 999-1001, rather than that of the petitioner.

Upon review, the Court of Appeals held that petitioner had failed to present sufficient evidence to support the jury's verdict that respondent's proffered reasons for his termination were pretextual, and affirmed the trial court's grant of judgment notwithstanding the verdict.

ARGUMENT

1. THE COURT OF APPEALS PROPERLY REVIEWED THE ENTIRE EVIDENTIARY RECORD

Petitioner's inference at page 7 of his petition that the Court of Appeals impermissibly reviewed the evidentiary record as to the events leading up to his termination is untenable. It is well established that a court of appeals is to apply the same test as the district court in reviewing the grant or denial of a judgment n.o.v. Therefore, it must review the entire evidentiary record to determine whether the evidence was sufficient to allow a reasonable juror to arrive at the verdict rendered. During such review the court of appeals owes no particular deference to the trial court's determination. *Boeing Co.* v. *Shipman*, 411 F.2d 365, 374 (5th Cir. 1969); *Schwimmer* v. *Sony Corp. of America*, 677 F.2d 946, 951-952 (2nd Cir. 1982) *cert. den.*, ... U.S. ....., 103 S.Ct. 362 (1982) *reh. den.*, ... U.S. ....., 103 S.Ct. 840 (1983); *Bohrer* v. *Hanes Corp.*, 715 F.2d 213, 219 (5th Cir. 1983). There was nothing "curious" (as petitioner put it) about the Court of Appeals' extensive review of the evidence presented in this case. Moreover, the evidence cited and relied upon by the Court of Appeals was essentially undisputed, as the Court expressly recognized at 718 F.2d 998, 1001.

In the absence of substantial factual disputes, the Court of Appeals had no occasion to delve into credibility matters and did not enter impermissible findings which implicated witness credibility merely because oral as well as documentary evidence was recited.

2. THE CONFLICT BETWEEN THE CIRCUITS IMPLICATES NO SERIOUS ISSUE OF LAW

Petitioner's primary contention as to why this Court should grant a writ of certiorari derives from the claim that a conflict exists between the circuits as to the measure of evidence to be reviewed by a court entertaining a judgment n.o.v. motion. Relying heavily upon Justice White's lone dissent from the denial of a writ of certiorari in *Schwimmer, supra,* petitioner contends that the "all of the evidence" measure expressly adopted by the Second, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and District of Columbia Circuits is in conflict with separate standards adopted by the First and Third Circuits, and by the Eighth Circuit. Notwithstanding Justice White's dissent, commentators would agree with Professor Moore who, in his treatise, wrote as to this apparent conflict:

> "The judicial authorities on the question of proper standards for directing a verdict would seem to be pretty much in accord. The language utilized remains diverse and, occasionally, troublesome. Fn. 33. [Note omitted]. Essentially, what the cases reveal is not a difficulty of ascertaining a proper standard, but a difficulty in applying the standard to the varying facts of the individual cases". 5A Moore and Lucas, *Moore's Federal Practice,* ¶50.02[1], p. 50-39 (2d Ed. 1982).

Clearly, Professor Moore views this problem as one involving the application of law to the particular facts, not as one implicating serious disputes between the circuits as a matter of law. Apparently, given this Court's refusal to grant certiorari in *Schwimmer, supra,* it agrees with the view that this conflict, such as it is, is not so compelling as to require the Court's issuance of a writ of certiorari.

3. EVEN IF A SERIOUS CONFLICT EXISTS, THE MATERIALITY OF THE ISSUE TO THIS CASE IS NIL

Even were this Court to determine that a conflict serious enough to warrant issuance of a writ of certiorari existed involving the measure of evidence to be considered in reviewing a judgment n.o.v., the instant case is not the one in which this dispute could best be resolved.

First, it should be noted that even the petitioner concedes (petition, p. 33) that the "all of the evidence" measure of reviewable evidence, adopted by the Fifth Circuit in *Boeing, supra,* and the Eleventh Circuit in *Neff* v. *Kehoe,* 708 F.2d 639 (11th Cir. 1983), was properly applied in the instant case.

Even more importantly, the petitioner makes no reference to any evidence, whether in the form of oral testimony or documentary evidence, which was wrongly considered (or wrongly not considered) by the Eleventh Circuit due to its reliance upon the "all of the evidence" standard. Nowhere in his petition are particular facts set forth the consideration of which, if the First, Third or Eighth Circuit standards were applied, would mandate reinstitution of the jury's verdict. Nor does the petitioner suggest which of the purportedly conflicting tests utilized in the First, Third or Eighth Circuits should be applied to the case at bar. Petitioner has seized upon this issue as a means by which to catch this Court's attention, without demonstrating its materiality to this case. Whether or not the Court were disposed to resolving this purported conflict, there is no indication that the same result would not occur in this case even if another standard were applied. Hence, this is not the case by which this Court could best resolve this conflict.

In reality, petitioner's dispute with the court of appeals' decision does not emanate from the measure of review applied, but from the fact that the Court of Appeals correctly found that there was no evidence to support the jury's verdict.

4. PETITIONER'S ARGUMENT WOULD INSULATE ALMOST ALL ADEA PLAINTIFFS FROM DISMISSAL FOR LACK OF EVIDENCE AND WOULD SHIFT IMPERMISSIBLY THE BURDEN OF PERSUASION

In an attempt to create the impression that the issue presented has particular import for ADEA cases, petitioner cites the Eighth Circuit's decision in *Dace* v. *ACF Industries,* 722 F.2d 374 (8th Cir. 1983). There, in a *dictum* at note 7 on page 377, the Court queried whether respect for the jury's role as fact finder requires a court to maintain the presumption of discrimination established by the *prima facie* case. However, the Court did not have to inquire further since the case was remanded because the trial court had directed a verdict for the defendant at the close of defendant's case without allowing the plaintiff to present rebuttal testimony, even though an offer of proof was made. Furthermore, the court of appeals in *Dace* cited critical testimony on issues which the Eighth Circuit has found, as a matter of law, raise an inference of age discrimination—which would mean, in turn, that only by making inappropriate appellate credibility determinations could a directed verdict be upheld.

Much closer to the instant matter is the Fifth Circuit's holding in *Bohrer, supra,* in which a judgment n.o.v. for defendant in an ADEA case was affirmed. There, the evidentiary record was carefully reviewed and any inferences raised by plaintiff were found to have been "dissi-

pated by the defendant's proffered justification." 715 F.2d at 219. The Court found, consistent with this court's decision in *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 101 S.Ct. 1089 (1981), that once the defendant articulates reasons for the dismissal, the plaintiff bears the burden of production merging with the ultimate burden of persuasion.

The petitioner's suggestion that ADEA cases should be treated differently for judgment n.o.v. purposes is unconvincing. Requiring that inferences raised by the establishment of a *prima facie* case should remain even after legitimate reasons are articulated by the defendant would insulate every ADEA plaintiff from dismissal by directed verdict or judgment n.o.v. so long as the "not onerous" (*Burdine, supra*, 450 U.S. at 253, 101 S.Ct. at 1094) burden of making out a prima case were met. Further, petitioner's approach would impermissibly shift the burden of persuasion since if any inference of discrimination were to survive defendant's articulation of legitimate reasons for its conduct, a plaintiff would be relieved of the burden of persuading the trier of fact that the defendant's proffered reasons were pretextual. The ultimate burden of persuasion must always remain with the plaintiff in a discrimination suit. *Board of Trustees of Keene State College* v. *Sweeney*, 439 U.S. 24, 25, n. 2, 99 S.Ct. 295, 296, n. 2 (1978); *Burdine, supra*, 450 U.S. at 253, 101 S.Ct. at 1093.

5. PETITIONER'S INVOCATION OF THIS COURT'S SUPERVISORY POWERS IS UNPERSUASIVE

Petitioner's *pro forma* attempt to invoke the supervisory power of this Court pursuant to Rule 17, paragraph 1(a), of the Rules of Practice is unavailing. Petitioner suggests that the Court of Appeals' ruling "has so far departed from the accepted and usual course of judicial proceedings,

or so far sanctioned such a departure by a lower court. . ." (Rule 17(1)(a)), that this Court's supervision should be exercised. But in the face of the rule's stringent standard, petitioner can do nothing more than make the bare allegation that "the court ignored the effect of cross-examination on the credibility of the defendant's witnesses. . ." (petition, p. 33). Petitioner makes no particularized reference to the manner in which the Court of Appeals purportedly ignored cross-examination or the impact of this purported omission upon the decision to affirm. To the contrary, the Court of Appeals explicitly indicated that the testimony upon which it relied was not in "substantial dispute" (*Krieg, supra,* at 1001), thereby rendering credibility findings unnecessary.

As to the Court of Appeals' finding of a lack of evidence sufficient to raise an inference of discrimination, (*Krieg, supra,* at 1001-1002), credibility determinations played no part. On each of the three points which petitioner sees as pretextual motives of defendant, the Court found no inference of discrimination could reasonably have been derived and did so without crediting any one account over another. Nothing in the petition demonstrates otherwise. There simply was no evidence of discriminatory purpose or pretext presented by the petitioner and both the trial court and the Court of Appeals recognized that fact.

Finally, as even the petitioner concedes, the use of the "all of the evidence" measure by the Court of Appeals in this case was fully appropriate given the Eleventh Circuit's adoption of that standard in *Neff, supra.* (petition, p. 32). Applying that standard the Court of Appeals affirmed the trial court's grant of judgment n.o.v. It is difficult to believe that either the trial court or the Court of Appeals "deviated greatly from that standard" given petitioner's failure to set forth any examples of such deviation and the Court's invocation of the proper formula.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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